LOH WAI KONG v. GOVERNMENT OF MALAYSIA & ORS.

[O.C.J. (Gunn Chit Tuan J.) March 16, 20 and April 27, 1978]
[Penang — Originating Motion No. 9 of 1978]

Administrative Law — Mandamus — Application for an order directing respondents to issue a Malaysian passport to applicant or to show cause why order should not be made — Person holding a public office — Whether right to travel abroad a fundamental right — Personal liberty — Whether issue or withdrawal of passport a prerogative exercisable by Yang di-Pertuan Agong — Whether there is alternative remedy — Whether duty to issue passport of ministerial character involving no judgment or discretion — Passport Act, 1966, s. 2 — Specific Relief Act, 1950, s. 44 (Act 137) — Federal Constitution, arts. 5(1), 8, 19 and 21.

Passport — Refusal or delay in granting of — Passport Act, 1966, s. 2.

Constitutional Law — Personal Liberty — Right of — — Federal Constitution, arts. 5(1), 9(2), 39, 40 & 160(1).

In this case the applicant applied for an order directing the respondents to issue a Malaysian passport to him or alternatively to show cause why the said order should not be made. It was claimed on behalf of the respondents that the issue of a passport was a prerogative of the Yang di-Pertuan Agong.

Held: (1) an order under section 44 of the Specific Relief Act, 1950 can only be made against a person holding a public office and could therefore not be made against the first two respondents, the Government of Malaysia and the Menteri Hal Ehwal Dalam Negeri;

(2) the refusal or delay in granting the applicant a passport was tantamount to preventing him from leaving the country and was in violation of his right of personal liberty under Article 5(1) of the Federal Constitution;

(3) the issue or withdrawal of passports is not a prerogative and the exercise of the executive discretion in this case could be reviewed by the courts;

(4) although the applicant in this case had no other remedy other than by way of an order under section 44 of the Specific Relief Act, 1950, it had not been shown that the duty in this case which was imposed on the passport authorities was of a purely ministerial character involving no judgment or discretion on the part of the third and fourth respondents and therefore the application must be dismissed.

Cases referred to:-

(1) *Koon How Chow* v. *Pretam Singh* [1972] 1 M.L.J. 180, 181 and 182.

(2) *Ng Bee v. Chairman, Town Council, Kuala Pilah* [1975] 1 M.L.J. 273, 275.

(3) *Satwant Singh Sawhney* v. *Ramarthnam, Assistant Passport Officer, New Delhi & Ors.* A.I.R. 1967 S.C. 1836, 1842, 1845, 1847.

(4) *A.K. Gopalan v. State* A.I.R. 1950 S.C. 27; [1950] S.C.R. 88.

(5) *Kharak Singh* v. *State of U.P. & Ors.* A.I.R. 1963 S.C. 1295; [1964] 1 S.C.R. 332.

(6) *Chandler & Ors.* v. *Director of Public Prosecutions* [1962] 3 All E.R. 142.

(7) *Blackburn* v. *Attorney-General* [1971] 2 All E.R. 1380.

ORIGINATING MOTION.

Jag-Jit Singh (*S. Chandran* with him) for the applicant.

Abu Talib bin Othman (Senior Federal Counsel) for the respondents.

Gunn Chit Tuan J.: This was an application by originating motion made under sections 44 and 45 of the Specific Relief Act, 1950 (Revised — 1974) for an order directing the Government of Malaysia, the Menteri Hal Ehwal Dalam Negeri, Malaysia, the Ketua Pejabat Imigeresen, Pulau Pinang, and the Pegawai Paspot, Pulau Pinang, who were named as the respondents, to issue a Malaysian passport to the applicant, or alternatively to show cause within a time to be fixed by the court why the said order should not be made.

The applicant, who is a Malaysian citizen, was a holder of a Malaysian passport which was issued to him on March 6, 1967. At that time he was a student in Australia and was granted a resident visa which entitled him to reside permanently in Australia. When he left Australia on April 25, 1975 his passport was indorsed with an Authority to Return to Australia which was valid for 3 years from that date i.e. until April 24, 1978. After his return to Malaysia the applicant took up employment as Group Finance Manager with the South-East Lumber Corporation Berhad at the Tasek Industrial Estate, Ipoh, Perak. As a result of certain events with which we were not concerned in this case, he was charged in the Sessions Court, Ipoh, on August 2, 1976, for two offences of forgery for the purpose of cheating under section 468 of the Penal Code. He was also charged about that time in the Second Magistrate's Court, Ipoh, for an offence of dishonest misappropriation of property under section 403 of the Penal Code. He claimed trial to all the three charges and the two Sessions Court cases were fixed for hearing on April 7 and 8, 1978, whilst the Second Magistrate's Court case was fixed for hearing on October 12, 13 and 14, 1978.

The applicant's passport was originally kept by the Magistrate's Court, Ipoh, when he was granted bail but it was later returned to him on June 9, 1977 at the request of his counsel who informed the court that the applicant wanted to go to Australia for a short visit in order to obtain an extension of his Authority to Return to Australia and to attend to some private affairs.

The applicant's passport had expired on March 5, 1977 and as it had been renewed once before, he was obliged to apply for a new passport on June 11, 1977, and for the return of his expired passport because it bears the said Authority for Return to Australia which was valid for three years until April 25, 1978.

Because the applicant's name had been put on a suspect list kept by the Immigration Department, he was not issued with a new passport. His name was included on the said suspect list because of the criminal charges preferred against him. When his application for a new passport was first received by the Immigration Department, the applicant's name was checked against the suspect list and on finding his name in the said list the application was referred to Immigration Headquarters in Kuala Lumpur. By then, Immigration Headquarters had also been informed by the police that the applicant had been charged with the said offences and decision on his application was therefore deferred until the outcome of the said criminal proceedings. On February 3, 1978 the Chief Officer of the Immigration Department, Penang, wrote to applicant's solicitors to inform them that consideration for the issue of a new passport to the applicant was deferred and that the issue of a Malaysian passport was a prerogative of His Majesty the Yang di-Pertuan Agong. A witness, namely Abu

Yazid bin Datuk Haji Mohd. Noor, Assistant Director of Immigration, Penang, was called by the respondents to give evidence on oath and he confirmed that the decision on the application for a new passport was deferred because of advice received from the police regarding the criminal charges against the applicant. He also confirmed that if there were no criminal charges against him then a new passport would have been issued to him, and that that was the reason why a decision was deferred on his application.

Section 44 of the Specific Relief Act 1950 reads as follows: —

"(1) A judge may make an order requiring any specific act to be done or forborne, by any person holding a public office, whether of a permanent or a temporary nature, or by any corporation or any court subordinate to the High Court:
Provided that —

(a) an application for such an order be made by some person whose property, franchise, or personal right would be injured by the forbearing or doing, as the case may be, of the said specific act;

(b) such doing or forbearing is, under any law for the time being in force, clearly incumbent on the person or court in his or its public character, or on the corporation in its corporate character;

(c) in the opinion of the judge the doing or forbearing is consonant to right and justice;

(d) the applicant has no other specific and adequate legal remedy; and

(e) the remedy given by the order applied for will be complete.

(2) Nothing in this section shall be deemed to authorize a judge —

(a) to make any order binding on the Yang di-Pertuan Agong;

(b) to make any order on any servant of any Government in Malaysia, as such, merely to enforce the satisfaction of a claim upon that Government; or

(c) to make any order which is otherwise excluded by any law for the time being in force."

At the commencement of hearing I asked both counsel for their views on whether the proper persons have been made respondents in this case. The learned Senior Federal Counsel indicated that he was not making any objections on this point and counsel for the applicant too did not proffer any arguments. However, according to sub-section (1) of section 44 of the Specific Relief Act, 1950, an order can only be made against any person holding a public office or any corporation or any court subordinate to the High Court. According to section 3 of the Interpretation Act, 1967, "public office" means an office in any of the public services, and "public services" means the public services mentioned in Article 132(1) of the Federal Constitution. Therefore, the first and second respondents in this case, namely the Government of Malaysia and the Menteri Hal Ehwal Dalam Negeri, Malaysia who are not persons holding a public office within the meaning of section 44 of the Specific Relief Act have, in my view, been wrongly cited as respondents. The third and fourth respondents, namely the Ketua Pejabat Imigeresen, Pulau Pinang, and the Pegawai Passport, Pulau Pinang are, of course, persons holding a public office within the meaning of the said section 44(1) of the Specific Relief Act, 1950. It is also quite clear that the five conditions contained in the five provisoes of sub-section (1) of section 44 of the Specific Relief Act, 1950, which are cumulative, must be fulfilled before the applicant can succeed in bringing his case within the purview of that section. (See *Koon Hoi Chow* v. *Pretam Singh;*[1] *Ng Bee* v. *Chairman, Town Council, Kuala Pilah*[2]). On the conditions laid down in proviso (a) to section 44(1) of the Specific Relief Act, Mr. Subash Chandran, counsel for the applicant, referred to Article 5(1) of the Constitution which is as follows: —

"No person shall be deprived of his life or personal liberty save in accordance with law."

He then referred to the Indian Supreme Court case of *Satwant Singh Sawhney* v. *Ramarathnam, Assistant Passport Officer, New Delhi & Ors.*[3] and contended that the right to travel abroad was a fundamental right and that the refusal or withdrawal of a citizen's passport was tantamount to preventing him from travelling abroad and violated the said Article 5(1) of the Constitution. He supported his contention by referring to section 2 of the Passport Act, 1966, which reads as follows: —

"(1) Every person entering Malaysia from any place beyond Malaysia shall produce to an immigration officer a passport; and that passport shall, in the case of an alien, have a valid visa for Malaysia issued on the authority of and by or on behalf of the Government of Malaysia.

(2) Every person leaving Malaysia for a place beyond Malaysia shall, if required so to do by an immigration officer produce to that officer a passport.

(3) An immigration officer may, in relation to any passport produced under this section, put to any person producing that passport such questions as he thinks necessary; and the person shall answer the questions truthfully.

(4) An immigration officer may make on any passport produced under this section such endorsement as he thinks fit."

Counsel argued that by reason of the above section it was necessary for the applicant to have a passport to enable him to leave the country and complained that the Immigration Department had exercised its discretion wrongly because it had been influenced by the Police.

Encik Abu Talib, the learned Senior Federal Counsel, on the other hand, not only referred to the provisions of sub-section (1) of section 44 of the Specific Relief Act but also referred to the provisions of sub-section (2)(a) of section 44 of that Act and contended that the issue of passports was a royal prerogative and that therefore no order can be made binding on the Yang di-Pertuan Agong to direct him to issue a passport to the applicant. He further pointed out that there was no law requiring passports to be issued and that there was therefore no specific legal right to the enforcement of a public duty in this case. The applicant has therefore, he contended, failed to satisfy the prerequisites for the issue of an order under section 44(1) of the Specific Relief Act, 1950.

As regards Article 5(1) of the Constitution it was the argument of the learned Senior Federal Counsel that "personal liberty" referred to therein was only concerned with physical restraints and not with freedom of movement which is dealt with in Article 9 of the Constitution. He contended that freedom to travel abroad is not guaranteed by our Constitution and there is no law in this country to guarantee travel abroad which is governed by treaties, conventions, etc. He even argued that refusal of a passport is not

equivalent to prohibition to travel abroad as a passport was merely an aid to travel and anyone can leave the country without a passport. He urged the court to treat the issue in this case as a question of whether or not a person is entitled to a passport and not as a question of whether he was entitled to travel abroad. With respect, I am inclined to the view that although theoretically any person in this country can leave Malaysia surreptitiously without a passport if he wished to do so, yet by virtue of the said Passport Act, 1966, he must have a passport or other valid document of identity before he can leave the country in a normal manner whether by air, sea or land travel. Therefore it was necessary in this case to consider the question whether the right to leave this country for travel or for other purposes, such as for education in or emigration to other countries, is part of the liberty of a person guaranteed by the Constitution.

Neither counsel has referred me to nor was I aware of any Malaysian authority which could be of assistance in interpreting the meaning of the expression "personal liberty" appearing in Article 5 of our Constitution. Both counsel have however referred to the said Indian Supreme Court decision of *Satwant Singh Sawhney* v. *Ramarathnam, Assistant Passport Officer, New Delhi & Ors.*[3] Whilst the learned Senior Federal Counsel has submitted that the minority decision of Hidayatullah J. and Bachawat J. in *Satwant Singh's* case was correct, counsel for the applicant has urged me to follow K. Subba Rao C.J., J.M. Shelat and C.A. Vaidialingam JJ. whose majority decision was the judgment of the Indian Supreme Court which held that the right to travel abroad is a fundamental right and that since there is no law regulating or depriving a person of such a right, refusal to give a passport or withdrawal of one given violates Article 21 of the Indian Constitution on protection of life and personal liberty. Two of the reasons given for their decision and which are found in the headnote to that case, are: —

(1) Theoretical possibility of exit from India for foreign travel is expressly restricted by executive instructions to shipping and air-lines companies and by refusal of foreign exchange. An Indian passport is factually a necessary condition for travel abroad and without it no person residing in India can travel outside India. The Indian Government, by refusing a passport to a person residing in India, completely prevents him from travelling abroad.

(2) The expression "personal liberty" in Article 21 takes in the right of locomotion and to travel abroad, but the right to move throughout the territories of India is not covered by it inasmuch as it is specially provided in Article 19. Under Article 21 no person can be deprived of his right to travel except according to procedure established by law.

Briefly the facts in *Satwant Singh's* case were as follows. Satwant Singh Sawhney, a citizen of India, was an importer/exporter of automobile parts and engineering goods trading in the name and style of Indi-European Trading Corporation. He also carried on another business of engineering. For the purpose of his business it was necessary for him to travel abroad. It was stated in the affidavit in reply that Satwant Singh, the petitioner, had been allowed to import ribbon brakeliners worth Rs 3 lakhs on condition that he would export out of India finished brakeliners worth Rs 4 lakhs. In breach of that legal obligation he sold 91 per cent of the finished brakeliners in India and was also involved in defrauding the Indian import control authorities. His passport was, therefore, withdrawn because his dealings in Kuwait were also under investigation and it was believed that he wished to leave India in order to tamper with evidence. These allegations were denied in his affidavit in reply but his petition was decided by the court without investigating the correctness of the affidavits. There were also other objectionable activities of the petitioner.

According to K. Subba Rao C.J. the question for determination in that case was "whether a person living in India has a fundamental right to travel abroad". He referred to decisions of the United States Supreme Court and concluded that it was clear that in America the right to travel abroad was considered to be an integral part of personal liberty. He also pointed out that in England the right to go abroad was recognised as early as in the year 1215 in Article 42 of the Magna Carta which article was omitted in the final version of it. He also referred to the following statement of Blackstone on personal liberty:

> "Personal liberty consists in the power of locomotion, of changing direction or moving one's person to whatever place one's own inclination may desire."

Reference was also made by him to the Grotius Society, Volume 32, under the heading "Passports and Protection in the International Law" where this facet of liberty was traced and he concluded that by the time of Blackstone the subject had acquired a general common law right to leave the Realm, subject to the prerogative right of the Crown to restrain him by the writ "ne exeat regno'. This prerogative writ later lapsed into desuetude and the result was that in England, subject to any special legislation, British subjects were entitled at Common Law to leave and enter the country at will. The learned Chief Justice then reviewed conflicting decisions of the various High Courts in India including the case of *A.K. Gopalan* v. *State*[4] and the case of *Kharak Singh* v. *State of U.P. & Ors.*[5] and stated that "it follows that under Article 21 of the Constitution of India no person can be deprived of his right to travel except according to procedure established by law. It is not disputed that no law was made by the State regulating or depriving persons of such a right". He further held that apart from the question whether the right to travel abroad was a fundamental right protected by Article 21 or not, the claim of the Union of India to issue passports at its discretion clearly violated Article 14 (of the Indian Constitution) which states that "The State shall not deny to any person equality before the law or equal protection of the laws within the territory of India". In the result, the court issued writs of mandamus against the respondents.

Hidayatullah J. on behalf of himself and Bachawat J. in their dissenting judgment also considered the question of passports and concluded that there is "no absolute right that a State must grant a passport to

whomsoever applies for it and subject to a question of arbitrariness or discrimination no one can really be said to possess a right enforceable at law." He pointed out that the Indian Constitution did not mention "foreign travel" and referred to the legislative entry relating to admission into, and emigration and expulsion from India, passports and visas and considered that "as the executive authority of the Union extended to matters contained in the Union List, there might be legislative as well as executive action relating to admission into, and emigration and expulsion from India as well as in respect of passports". Their Lordships also considered that "executive action normally must follow legislation and not precede it but the existence of statutory enactment is not a condition for the exercise of executive action". In other words, they were of the view that legislative authority was not necessary to grant or refuse a passport and it appeared to them that passports "must be treated as falling within the prerogative domain of foreign affairs, and the authorities which grant or withhold them must possess considerable freedom of action". The minority judgment also dealt with the various judgments in *Gopalan's* case and *Kharak Singh's* case and held that "the citizen's right of motion and locomotion in so far as it is recognizable, has been limited by the Constitution to the territories of India and that according to *Kharak Singh's* case, that is the limit of the right. It is not possible to read more of that right in Article 21. In any event, there is no absolute right to demand a passport because that is not a right to personal liberty even in the Blackstonian sense." The dissenting judgment of Hidayatullah and Bachawat JJ. concluded that,

"whatever the view of countries like the U.S.A. where travel is a means of spending one's wealth, the better view in our country is that a person is ordinarily entitled to a passport unless, for reasons which can be established to the satisfaction of the court, the passport can be validly refused to him. Since an aggrieved party can always seek for a mandamus if he is treated unfairly, it is not open, by straining the Constitution, to create an absolute and fundamental right to a passport where none exists in the Constitution. There is no doubt a fundamental right to equality in the matter of grant of passports (subject to reasonable classifications) but there is no fundamental right to travel abroad or to the grant of a passport. With all due respect we say that the court has missed one for the other. The solution of a law of passports will not make things better. Even if a law were to be made the position would hardly change because the utmost discretion will have to be allowed to decide upon the worth of an applicant. The only thing that can be said is that where the passport authority is proved to be wrong, a mandamus will always right the matter."

Having considered the arguments of counsel for the applicant and of counsel for the respondents and both the majority and minority judgments in the said *Satwant Singh's* case, I would prefer with respect to follow the majority judgment which is the decision of the Indian Supreme Court in that case. In my humble opinion, Clause (2) of Article 9 of our Constitution only guarantees to every *citizen* the right to move freely throughout Malaysia and to reside in any part thereof. Our Constitution naturally cannot guarantee freedom of movement to every citizen or to any person in territories outside Malaysia. Article 5(1) of our Constitution is not only applicable to citizens but also guarantees the liberty of *any person* including non-citizens whilst in this country. The expression "personal liberty" must therefore be liberty to a person not only in the sense of not being incarcerated or restricted to live in any portion of the country but also includes the right to cross the frontiers in order to enter or leave the country when one so desires. Refusal or withdrawal of one's passport should therefore not be seen so much as affecting the right of a person to travel abroad but should be considered, in my view, in the light of whether there is violation of his right of personal liberty under Article 5(1) of our Constitution.

Having reached the conclusion that because refusal or delay in granting the applicant a passport was tantamount to preventing him from leaving the country and was a restraint on his person, it was therefore next necessary to consider whether he was deprived of personal liberty in this case in accordance with law. "Law" is defined in Article 160(1) of the Constitution to include "written law, common law in so far as it is in operation in Malaysia or any part thereof, and any custom or usage having the force of law in Malaysia or any part thereof". Up to the present moment there is no statute in this country governing the issue, renewal or withdrawal of passports. But with respect I do not think that the position in this country now is similar to that in England where the power to grant, withhold or withdraw a passport is a prerogative power. In the case of the exercise of statutory powers, British Courts may pronounce the purported exercise of such a power invalid if it was exercised without lawful authority, but in the case of prerogative powers, however, the general rule is that British Courts, if required to determine the validity of the exercise of prerogative powers, are limited to ascertaining the existence and scope of such powers and will not consider the sufficiency of the grounds on which they have been exercised. (See *Chandler & Ors.* v. *Director of Public Prosecutions*;[6] *Blackburn* v. *Attorney-General*[7]). Of the executive powers vested in the British Central Government and bearing directly on individual rights and interests, relatively few are derived from the royal prerogative. Examples of such prerogative powers are the power to grant, withhold or withdraw a passport; to requisition property and intern enemy aliens in wartime; to grant charters of incorporation to university institutions; to pardon persons convicted of crimes. (See *Halsbury's* Laws of England (4th Ed.) Vol. 1 paragraph 19).

In this country, as in India, we now have a written constitution and whatever may have been the position previously, it is now provided in Article 39 of our Constitution that the "executive authority of Malaysia shall be vested in the Yang di-Pertuan Agong and exercisable, subject to the provisions of any federal law and of the Second Schedule, by him or by the Cabinet or any Minister authorised by the Cabinet but Parliament may by law confer executive functions on other persons". Article 40 which follows Article 39 then divides the functions of the Yang di-Pertuan Agong into those which he may exercise in his discretion and those which he must exercise in accordance with ministerial advice. Except for the functions specified in Clause (2) of Article 40 which the Yang di-Pertuan Agong may act in his discretion, the Yang di-Pertuan Agong in the exercise of his other

functions under the Constitution or federal law shall act in accordance with the advice of the Cabinet or Minister acting under the general authority of the Cabinet. The executive authority of Malaysia which is vested in the Yang di-Pertuan Agong is therefore exercisable either directly i.e. personally or through officers subordinate to him. In our present case, although at present there is no statute governing the issue and withdrawal of passports, yet it is clear from the Ninth Schedule List, I (item 1(f) of the Federal List) that passports are a matter in respect of which Parliament may make laws. In my humble opinion, the power to grant, withhold or withdraw passports is not now a prerogative exercisable by the Yang di-Pertuan Agong personally, but is one of the functions within the executive authority referred to in Article 39 of the Constitution. Any executive action through officers subordinate to the Yang di-Pertuan Agong in exercise of that function in respect of passports etc. is reviewable by the courts and the non-existence of a statutory enactment covering that function does not make it any less so. In other words, I was of the view that as the issue or withdrawal of passports is not a prerogative, the exercise of the executive discretion in this case can be reviewed by the courts, and an order, if necessary, can be made under section 44(1) of the Specific Relief Act, 1950, to direct the third and fourth respondents to issue a passport to the applicant.

The position in this country with regard to the issue and withdrawal of passports may well change as in the case of India where the Indian Passport Act, 1967 came into force on June 24, 1967 and in sections 5 and 6 of the said Indian Act considerations relevant to the exercise of the power concerning the issue and refusal of passports have been statutorily set out. For convenience of reference I reproduce hereunder the relevant sections of the said Indian Passport Act —

"Applications for passports, travel documents, etc., and orders thereon.

Section 5(2): On receipt of an application, the passport authority, after making such inquiry, if any, as it may consider necessary, shall, subject to the other provisions of this Act, by order in writing, (a) issue the passport or travel document with endorsement, or, as the case may be, make on the passport or travel document the endorsement, in respect of the foreign country or countries specified in the application; or (b) issue the passport or travel document with endorsement, or, as the case may be, make on the passport or travel document the endorsement, in respect of one or more of the foreign countries specified in the application and refuse to make an endorsement in respect of the other country or countries; or (c) refuse to issue the passport or travel document or, as the case may be, refuse to make on the passport or travel document any endorsement.

(3): Where the passport authority makes an order under clause (b) or clause (c) of sub-section (2) on the application of any person, it shall record in writing a brief statement of its reasons for making such order and furnish to that person on demand a copy of the same unless in any case the passport authority is of the opinion that it will not be in the interests of the sovereignty and integrity of India, the security of India, friendly relations of India with any foreign country or in the interests of the general public to furnish such copy.

Refusal of passports, travel documents, etc.

Section 6(1): Subject to the other provisions of this Act, the passport authority shall refuse to make an endorsement for visiting any foreign country under clause (b) or clause (c) of sub-section (2) of section 5 on any one or more of the following grounds namely: (a) that the applicant may, or is likely to, engage in such country in activities prejudicial to the sovereignty and integrity of India; (b) that the presence of the applicant in such country may, or is likely to, be detrimental to the security of India; (c) that the presence of the applicant in such country may, or is likely to, prejudice the friendly relations of India with that or any other country; (d) that in the opinion of the Central Government the presence of the applicant in such country is not in the public interest.

(2): Subject to the other provisions of this Act, the passport authority shall refuse to issue a passport or travel document for visiting any foreign country under clause (c) of sub-section (2) of section 5 on any one or more of the following grounds, and on no other ground, namely: (a) that the applicant is not a citizen of India; (b) that the applicant may, or is likely to, engage outside India in activities prejudicial to the sovereignty and integrity of India; (c) that the departure of the applicant from India may, or is likely to, be detrimental to the security of India; (d) that the presence of the applicant outside India may, or is likely to, prejudice the friendly relations of India with any foreign country; (e) that the applicant has, at any time during the period of five years immediately preceding the date of his application, been convicted by a court in India for any offence involving moral turpitude and sentenced in respect thereof to imprisonment for not less than two years; (f) that proceedings in respect of an offence alleged to have been committed by the applicant are pending before a criminal court in India; (g) that a warrant or summons for the appearance, or a warrant for the arrest, of the applicant has been issued by a court under any law for the time being in force or that an order prohibiting the departure from India of the applicant has been made by any such court; (h) that the applicant has been repatriated and has not reimbursed the expenditure incurred in connection with such repatriation; (i) that in the opinion of the Central Government the issue of a passport or travel document to the applicant will not be in the public interest."

There is also no statute at present in England to regulate the issue and withdrawal of passports, but it is understood that in the United Kingdom refusal to issue or renew passports are rare events and it was stated by a Foreign Office Minister there in 1958 that there were four categories of refusal which are identifiable as follows: —

First, in the case of minors suspected of being taken illegally out of the jurisdiction;

Secondly, persons believed on good evidence to be fleeing the country to avoid prosecution for a criminal offence;

Thirdly, persons whose activities are so notoriously undesirable or dangerous that Parliament would be expected to support the action of the Foreign Secretary in refusing them a passport or withdrawing a passport already issued in order to prevent their leaving the United Kingdom; and

Fourthly, persons who have been repatriated to the United Kingdom at public expense and have not repaid the expenditure incurred on their behalf.

In my humble view, I think that as personal liberty is involved, it is therefore recommendable that there should be some legislation on the subject of the issue and withdrawal of passports, visas, permits of entry or other certificates. It is true, as pointed out by Hidayatullah J. in *Satwant Singh's* case that although executive action normally follow legislation and not precede it, the existence of a statutory enactment is not a condition for the exercise of executive action. But with a statute governing the issue, refusal and withdrawal of passports etc. that function would then cease to be a matter of administrative or executive action without prior legislative authority, and

any dispute between the issuing authority and an applicant concerning the issue or withdrawal of passports could then be a matter more easily determined by the courts.

Although no arguments were advanced before me concerning Article 8 of our Constitution which is equivalent to Article 14 of the Indian Constitution on equality, it is conceivable that it could be argued by a person who has been refused a passport that his rights under the said Article have also been violated. I was aware that the learned Chief Justice in *Satwant Singh's* case, in considering whether the act of the respondents in that case in refusing to issue a passport to the petitioner had infringed his fundamental right of equality under Article 14 of the Indian Constitution, has said that: —

"The doctrine of equality before the law is a necessary corollary to the high concept of the rule of law accepted by our Constitution. One of the aspects of rule of law is that every executive action, if it is to operate to the prejudice of any person, must be supported by some legislative authority. Secondly, such a law would be void, if it discriminates or enables an authority to discriminate between persons without just classification. What a Legislature could not do, the executive could not obviously do. An arbitrary prevention of a person from travelling abroad will certainly affect him prejudicially. A person may like to go abroad for many reasons. He may like to see the world, to study abroad, to undergo medical treatment, to collaborate in scientific research, to develop his mental horizon in different fields and such others. An executive arbitrariness can prevent one from doing so and permit another to travel merely for pleasure. While in the case of enacted law one knows where he stands, in the case of unchannelled arbitrary discretion, discrimination is writ large on the face of it. Such a discretion patently violates the doctrine of equality, for the difference in the treatment of persons rests solely on the arbitrary selection of the executive. The argument that the said discretionary power of the State is a political or a diplomatic one does not make it anytheless an executive power."

Hidayatullah J. in that case also expressed the opinion that arbitrary action in refusing a passport or evidence of discrimination would not be without any redress in India, and said that: —

"Executive action has to comply with the equal protection clause of our Constitution, and a complaint of refusal of a passport on insufficient or improper grounds is capable of being raised, irrespective of whether there is a fundamental right to travel abroad or not."

In other words, all the learned judges in the said *Satwant Singh's* case were of the view that irrespective of whether there was a fundamental right under Article 21 of the Indian Constitution on personal liberty, executive action in refusing to grant a passport can be reviewed by the courts and it can be considered whether such order refusing to issue a passport to an applicant offended Article 14 of the Indian Constitution on equality before the law. As I have, as stated above, come to the conclusion that executive action in refusing a passport affected personal liberty under Article 5 of our Constitution and was also reviewable by the courts, I did not think that it was necessary, apart from noting the views of the learned Indian judges on Article 14 of the Indian Constitution, to state my views on Article 8 of the Constitution.

Reverting to our case, I was satisfied that the applicant has shown that he had a personal right which would be injured or defeated if an order was not made under section 14 of the Specific Relief Act. I was also of the view that there was a duty for the third and fourth respondents in their public character to issue passports. Proviso (b) of section 44(1) of the said Act requires that the doing or forbearing must be clearly incumbent on the respondents under any law for the time being in force. In this case there is no statute law governing the issue of passports, but the expression "any law for the time being in force", includes not only enactments of Parliament but also the common law administered in this country. However, the matter did not end there and I agree with Sharma J. (as he then was) in the above-mentioned case of *Koon Hoi Chow* v. *Pretam Singh*[1] that there are two more prerequisites essential to the issue of an order under section 44 of the Specific Relief Act, namely:

(i) whether such duty is of an imperative ministerial character involving no judgment or discretion on the part of the respondent; and

(ii) whether the applicant has any remedy, other than by way of mandamus, for the enforcement of the right which has been denied to him.

I was satisfied that the applicant in this case had no other remedy other than by way of order made under section 44 of the Specific Relief Act, 1950, for the enforcement of his right which has been denied to him. But on the other hand it has not been shown to me that the duty in this case which is imposed on the passport authorities is of an imperative ministerial character involving no judgment or discretion on the part of the third and fourth respondents. To use the words of Hidayatullah J. again in the case of *Satwant Singh's* case, "the authorities which grant or withhold passports must possess considerable freedom of action". The learned judge also said that "before Government places in the hands of a person a document which pledges the honour of the country, Government is entitled to scrutinise the credentials of such persons. The right, therefore, to obtain a passport is a qualified one, and not an absolute one." Therefore, in the case of the issue or withdrawal of a passport the person holding a public office concerned must in arriving at his judgment on whether or not to issue or withhold a passport have a fair amount of discretion in the matter. Here as the law stands today it cannot be said that the applicant's right is really so very clear and well defined in a statute as to be free from reasonable controversy. And above all, the applicant has failed to show that the duty here was one which the third and fourth respondents had no discretion at all. Moreover I was of the opinion that in the particular circumstances of this case the issue of a new passport to the petitioner is not consonant to right and justice. As the applicant's case has not fulfilled all the five conditions set out in the provisoes to section 44(1) of the Specific Relief Act, I therefore declined to exercise my discretion to make an order under section 45 of the said Act. The application was therefore dismissed with costs.

Application dismissed.

Solicitors: *Jag-Jit Singh & Subash Chandran.*